In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 05-2385
Criminal

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

PATRICK DAVID QUICK,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

APPELLANT'S BRIEF AND ADDENDUM

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Mr. Quick argues in this appeal that the district court committed error in two ways. First, the court erred when it denied Mr. Quick's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. The motion for a new trial was based upon a prejudicial variance between the Indictment and the government's case and, particularly, its closing rebuttal argument. The motion also sought a new trial on the basis of insufficiency of the evidence of intent to defraud, an issue the Appellant raises here as well. Mr. Quick requests oral argument of 15 minutes for oral argument.

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PRELIMINARY STATEMENT

This appeal is from a final judgment entered on May 18, 2005, by the Honorable John R. Tunheim, United States District Court for the District of Minnesota. The government invoked the jurisdiction of the district court pursuant to 18 U.S.C. § 3231. Mr. Quick filed a timely Notice of Appeal on April 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I.

WHETHER THE DISTRICT COURT ERRED WHEN IT DENIED MR. QUICK'S MOTION FOR A NEW TRIAL DESPITE THE OCCURRENCE OF A PREJUDICIAL VARIANCE?

Stirone v. United States, 361 U.S. 212, 1960

United States v. Cruz-Padilla, 227 F.3d 1064 (8th Cir. 2000)

United States v. Glenn, 828 F.2d 855 (1st Cir. 1987)

United States v. Griffin, 215 F.3rd 866 (8th Cir. 2000)

II.

WHETHER THE APPELLANT'S CONVICTIONS SHOULD BE REVERSED FOR INSUFFICIENCY OF THE EVIDENCE?

United States v. D'Amato, 39 F. 3rd 1249 (2nd Cir. 1994)

United States v. Lefkowitz, 125 F. 3rd 608 (8th Cir. 1997)

United States v. Frost, 321 F.3rd 738 (8th Cir. 2003)

STATEMENT OF THE CASE

Mr. Quick was indicted on July 28, 2004, charged in 12 counts mail fraud and one count of money laundering in alleged violation of 18 U.S.C. § 1341 and 18 U.S.C. § 1957. He proceeded to trial commencing on August 17, 2004 before the Honorable John R. Tunheim, United States District Court for the District of Minnesota. On August 23, 2004, the jury returned a verdict convicting Mr. Quick of all counts. Mr. Quick filed a motion for a new trial on August 28, 2004, which was denied. (Docket No. 78; Add-15) On April 21, 2005, following the presentence report process, the district court sentenced Mr. Quick to a period of 46 months in the custody of the Bureau of Prisons.

STATEMENT OF THE FACTS

The Appellant was indicted on a specific allegation in twelve counts that he committed mail fraud, and one count of money laundering in a scheme alleged to have occurred between about January 2001 until approximately June 2003. The specific allegation was that the scheme consisted of a false representation that he would establish a "reserve account" consisting of a holding of precious metals for his customers, and that he would pay monthly interest on the value of the accounts thus established, while holding the precious metals. (Addendum-7). As late as its opening statement, the Government still clearly proceeded on the specific allegation that the

defendant was supposed to purchase gold for the alleged victims, hold the same for them in an unspecified location and pay interest on the value thereof. The Government based its case, significantly, on proof that the defendant had never actually purchased the gold from wholesale coin dealers in the local Minneapolis area, as a means of showing the falsity of this supposed representation. (T-I, P-38). [1] The defense opening statement previewed that the defendant contended that there was no such agreement to hold precious metals and pay interest on the value thereof; and that while the defense was not in a position to anticipate just how the government would describe the terms of this supposed "reserve account," in which the metals would be held in a fail-safe manner and generate interest payments, that the evidence would actually show that the victims were knowing investors in the defendant's start-up company, and that the charges were the result of a "misunderstanding." (T-I, P-50.)

The government produced a number of witnesses in support of its fraud theory, starting with Mike Will, who explained the business practices of soliciting customers to convert their currency into precious metals as followed International Strategic Assets, (ISA) a coin sales company where Mr. Will and the defendant had been brokers. He explained that customers would send their money and once the funds

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[1] Citations to transcripts will be cited with reference to "T" and the Volume and page number. Documents in the Addendum will be cited as "Add.___."

were confirmed as good payment, the customers would be sent the coins they purchased. And Mr. Will's direct testimony generally suggested that it was not a suitable business practice for the company to hold the coins for the customer. (T-I, P55-63.)

During cross examination Mr. Will agreed that this "hedge" theory of investment, on which the government based its theory of appropriate precious metals investing, involves an immediate loss to the investor of approximately 30% of the value of their investment because of commissions and other associated fees. (T-I, p-66-67). But Mr. Will agreed, after some apparent difficulty understanding the questions, and some resistance to agreeing with the possibility of establishing a fluctuating price investment account, that an investing strategy like Mr. Quick established at his company, RareTrader, might be sound and possible, especially in a time when the gold market was predicted to rise dramatically, as was the state of affairs when Mr. Quick started his new company. (T-I, -68-77).

The government continued with its charged theory with witness Linda Clark, who agreed that she had sent a check for the purchase of gold coins, did not know how Mr. Quick was to be compensated for his effort, but that she did receive the agreed monthly interest payments. (T-II, p-21-23). When asked whether she ever received confirmation that her "check had been used to purchase liberty coins," she replied

that the interest checks indicated a "reserve account" and that "there were 80 $10 liberties on my individual checks." (T-II, p-22). She related the fact that Mr. Quick later informed her of the need to reduce the rate of interest, because the market was not going up and he could not afford to pay the higher interest, at which point she sent him more coins and that her expectation was that these too, would be held in the reserve account. (T-II, p-30). On cross examination Ms. Clark agreed that the suggestion during her direct testimony, that Mr. Quick was still working at International Strategic Assests (ISA), was not the result of anything Mr. Quick had told her, and that she was aware she was dealing with his new company. (T-II, p-38-39). She wished to maintain, however, that it had been her belief that Mr. Quick was purchasing and holding the gold for her. (T-II, p42, 45, 48). She did agree that she understood that she would receive monthly interest payments and that she was to receive the advantage of any market increase in the price of gold as well, although she claimed she "didn't stop to think" how this would be possible. (T-II, p-44-49).

The charged theme of a "reserve account" arrangement continued with Ms. Laura Arasmith, although with a slight variation in her understanding of the business arrangement. When asked to choose whether Mr. Quick was authorized to sell her gold or whether she was "expecting it to go into a reserve account," she answered that she expected it to be tied up for one year and that: "If the price went up, it would be

good. If it didn't, whatever, but I could get it back after a year." (T-II, p-63). She stated that the addition of the phrase "Laura Arasmith trust" on her interest checks was a notation she asked Mr. Quick to add. (T-II, p-81). And she described investing in Mr. Quick's plan to sell "historical documents" to the public. (T-II, p-92; 121-123). The element of willful harm suggested by the government's "reserve account shelf" theory was thus in need of revision by the time Ms. Arasmith finished testifying.

While first wanting to deny that she had intended to invest in Mr. Quick's company, Ms. Arasmith admitted that she had previously written to the Minnesota Attorney General complaining that she had invested in RareTraders, Inc. (TII, p-105-108). Ms. Arasmith clearly described intending to be an investor and having the expectation that if gold prices went up and/or the company fared well, her investment would appreciate. (T-II, p-111-116). And, a sophisticated investor with experience with the stock market, she agreed generally– if reluctantly -- with the defendant's account of the RareTraders, Inc. business and his "gold inventory account" approach. (T-II, p-119-120). Significantly, she admitted that her "whole purpose" of assisting the criminal investigation and prosecution of Mr. Quick was to get "some" of her money back. (T-II, p-131)(Def. Exhibit 1).

Mr. Quijano, a tragic gentleman suffering from Alzheimers, testified to a loss resulting from his sending Mr. Quick some coins for liquidation, and his unhappiness

with the fact that the gold market had not gone up as the ISA people told him it would, and that when he sent the gold he had purchased for liquidation by RareTrader, he was expecting to receive the full price he had paid ISA. (T-II, p-134-141). His daughter Connie confirmed that expectation in her testimony, and identified her father and his investigator, former Minnesota BCA agent Ray DiPrima as the source of her belief. (T-II, p-155). The evidence made clear that the request to liquidate came as RareTrader was failing, Quick was liquidating his personal assets, and that Quick could not meet the customer's demand for the full price he had paid to ISA. But the issue came to conclusion shortly because Mr. Quijano had hired an investigator.

Mr. DiPrima, the evidence later revealed during testimony of Detective Brian Gunderson, had undertaken to investigate Patrick Quick for Mr. Quijano, and ultimately secured Detective Gunderson's help obtaining a search warrant for Mr. Quick's home. (T-II, p-214-219; T-III, p-29-41). Although he denied doing this as a favor for his old working associate, DiPrima, and denied having been the source of the government's fraud theory, Gunderson confirmed Mr. Quick's immediate cooperation with the investigation, including to answer all questions; confirmed that he contacted the two woman on the basis of documents he found; and generally confirmed that his initial assumption that the cases involved a simple fraud scheme in which the victims sent gold and money and were thereafter unable

to retrieve either. His theory, he said, eliminated the possibility of a legitimate business enterprise; one which Mr. Quick had immediately explained to him, but which the detective didn't believe. (T-III, p-42-62).

On the basis of his pre-formed conclusion, Gunderson didn't include the defendant's explanation in his report. (T-III, p-61-62). As for the taped account of the same, he asserted that the defendant's explanation was lost in the process of copying at Gunderson's police agency. (T-III, p-63). In response to the question whether the "misunderstandings" about the business that the trial was now revealing might have been the result of the Detective's aggressive efforts to support his theory in his initial investigation, the detective professed a lack of understanding and a need for clarification of the question. (T-III, p-65). He declared the same difficulty in response to re-cross examination asking about how his efforts might have assisted his colleague DiPrima's case. (T-III, p-70). FBI Agent Todd Thompson, whose investigation inherited the Gunderson theory, confirmed that his testimony before the grand jury, consistent with the indictment allegations, proceeded on the basis of there being "no gold in the reserve account . . ." (T-III, p-137-38). The government called Joe Hirdler, who was on the board of RareTrader, but denied having any knowledge of the operation, other than that it was a new company Mr. Quick formed to trade gold and make a profit on market fluctuation. (T-II, p-169). Mr. Hirdler admitted receiving

approximately $4,000 from Mr. Quick in check payments, but could not recall the reason, other than that they may have represented a loan. He denied that they were payment for gold trades he had executed for Mr. Quick or that he received a portion of the profit. (T-II, p171).

The facts thus present a government case in which the fraud theory was charged on the basis of a "scheme" to defraud on the basis of simple false representations that the gold, and the money equivalent of purchased gold, would be held by Patrick Quick in a way similar to the investment approach his former customers had come to expect with the ISA "hedge investment" approach.

But the defense, both in cross-examination and during the presentation of direct defense testimony, demonstrated the falsity of the government allegation. And so, it is perhaps not surprising that as the government concluded the case, during rebuttal final argument, with a new twist on its fraud theory addressing what the evidence had shown, and which was consistent with the defense opening statement except for its reference to Mr. Quick's gambling, which the defense had objected to on relevance grounds early in the trial:

> "I mean, if this is really true, that she was putting her money into RareTrader, that she knew he was going to sell the gold, then she's totally reliant on Mr. Quick's abilities as a businessman which she knows absolutely nothing about. She's never even met him in person. She would be gambling with her money. And yet the evidence shows us who the gambler was. The gambler wasn't Laura Arasmith. The gambler was Mr. Quick." (T-IV, p169-70.)

SUMMARY OF THE ARGUMENT

Mr. Quick was convicted on all counts of a thirteen count indictment. He moved for judgment of acquittal and a new trial on grounds that there was a variance between the indictment and the case presented at trial. In particular, the government's final rebuttal argument adopted a theory under which it asked the jury to find the defendant guilty on the basis of the monetary loss and Mr. Quick's gambling activity, rather than the "reserve account shelf" scheme theory on which the case was indicted. The government thus stepped away from its initial intent to harm theory, which was based on the charged allegation of a fraudulent promise to hold the valuable metals, and instead adopted a posture wherein it argued the combination of the large corporate loss and Mr. Quick's gambling in order to ask for conviction on the intent element.

The appellant contends that the evidence is thus insufficient to establish the intent required to support conviction of the mail fraud counts and further that the money laundering count must fail because the predicate mail fraud was not established.

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT DENIED MR. QUICK'S MOTION FOR A NEW TRIAL BASED ON THE OCCURRENCE OF A PREJUDICIAL VARIANCE.

A. Standard of Review:

In general, a reviewing court must evaluate a trial court's decision regarding a motion for new trial for clear abuse of discretion. See *United States v. Luna*, 265 F.3d 649, 651 (8th Cir. 2001); see also *United States Cruz-Padilla*, 227 F.3d 1064, 1068 (8th Cir. 2000)(applying abuse of discretion standard in evaluating court's grant of motion for new trial based on improper closing argument). However, in the case of a motion for a new trial based upon a variance between the crime charged and the case proven or argued to the jury, the question is a legal one, to be reviewed *de novo*. See *United States v. McClatchey*, 217 F.3d 823, 831 (10th Cir. 2000)(applying de novo review to reverse district court's decision to grant motion for a new trial).

B. The Rule 33 Motion for a New Trial Basis on Prejudicial Variance

Federal Rule of Criminal Procedure 33 provides, in relevant part: "On a defendant's motion, the court may grant a new trial to that defendant if the interests if the interests of justice so require." Although such motions can be based on many different grounds, from improper closing arguments, *see e.g. Cruz-Padilla*, 227 F.3d 1064,

to sufficiency of the evidence, *see e.g. Luna*, 265 F.3d 649, Mr. Quick's motion sought a new trial on the grounds of insufficient evidence and a fatal variance between the crimes charged in the Indictment and the theory of the case put forth in the government's rebuttal closing argument. It is axiomatic that a defendant may not be tried on charges that were not made in the indictment. *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

This Court has held that "[a] variance between the facts charged in a criminal indictment and evidence offered by the government at trial requires a new trial if it prejudices the defendant, for example, by depriving him of adequate notice of the charges he must defend." *United States v. Griffin*, 215 F.3d 866, 868 (8th Cir. 2000). The primary question in deciding whether prejudice has occurred is usually whether the indictment "fully and fairly apprised the defendant of the charges he or she must meet at trial." *United States v. Begnaud*, 783 F.2d 144, 148 (8th Cir. 1986). A variance can occur when the government theory shifts over the course of the trial from that alleged in the Indictment, or when a prosecutor's argument to the jury encourages a conviction based upon facts different from those alleged in the Indictment. *See e.g. United States v. McClatchey*, 217 F.3d 823, 831 (10th Cir. 2000) (stating that a shift in government theory can constitute a prejudicial variance); *United States v. Reeder*, 170 F.3d 93, 104-05 (1st Cir. 1999)(applying

variance analysis when the complained-of conduct is the prosecutor's closing argument); *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996)(same).

The government's theory during trial slowly moved away from the simple allegation of a fraudulent scheme dependant upon a misrepresentation about the holdings of gold, to a unspoken theory that the scheme to defraud was evidenced by the fact that he used the funds. However, in its rebuttal closing argument, to which Mr Quick had no opportunity to respond, the government finalized this theory with an argument that changed its theory radically. The government argued as follows:

> "I mean, if this is really true, that she was putting her money into RareTrader, that she knew he was going to sell the gold, then she's totally reliant on Mr. Quick's abilities as a businessman which she knows absolutely nothing about. She's never even met him in person. She would be gambling with her money. And yet the evidence shows us who the gambler was. The gambler wasn't Laura Arasmith. The gambler was Mr. Quick." (T-IV, p-169-70.)

And with that, the government dismissed the importance of the defendant's account, disregarded its own staunchly maintained, false allegation of a promise to hold the metals without cost of management or other expense, and left the jury to find Mr. Quick guilty on the basis of the loss to the investors, and the fact that he is a gambler. This variance was fatal or prejudicial because Mr. Quick wasn't given notice and an opportunity to defend against this newly streamlined government theory. *United States v. Novak*, 217 F.3d 566 (8th Cir. 2000).

As the jury's question shortly evidenced, they seemed to initially have rejected the government's charged theory and asked the trial court's assistance with whether they might relate later formed intent back to the mail fraud counts. (Add-13) The variance, first by slow abandonment during the trial, and then by the timing of the prosecutor's final argument in rebuttal in the final stage of this case, resulted in an unfair trial in spite of a careful effort by the lawyers and the trial Court during the due process progress of the trial. *See, United States v. Novak*, 217 F.3d 566 (8th Cir. 2000). This Court should reverse the trial court and grant a new trial where the defendant and the trial court will have an opportunity to conduct the trial in accord with the allegations the government has now adopted. *United States v. Glenn*, 828 F.2d 855, 860 (1st Cir. 1987)(reversing where variance between conspiracy charged and conspiracy proven prejudiced the defendant).

II.
THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS AND THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL BECAUSE THE GOVERNMENT'S EVIDENCE DID NOT ESTABLISH AN INTENT TO DEFRAUD

A. Standard of Review

Evaluation of the sufficiency of the evidence from the appellate perspective requires a review of the evidence "in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all

reasonable inferences drawn from the evidence that support the jury's verdict." *United States v. Cook*, 356 F.3d 913, 917 (8th Cir.2004). It is *de novo* review, viewing the evidence in a light most favorable to the Government. *U.S. v. Fitz*, 317 F.3d 878, 881 (8th Cir. 2003). Although reasonable inferences must be drawn in the Government's favor, "where the Government's evidence is equally strong to infer innocence as to infer guilt, the verdict must not be one of guilty and the court has a duty to direct an acquittal." *U.S. v. Davis*, 103 F.3d 660, 667 (8th Cir. 1996) (citations and quotation marks omitted); *see U.S. v. Steinhilber*, 484 F.2d 386, 389 (8th Cir. 1973).[2] The standard of review on reversing a jury verdict based upon insufficiency of evidence is whether a "reasonable fact-finder must have harbored reasonable doubt relating to the government's proof on at least one of the essential elements of the offense." *U.S. v. Jensen*, 141 F.3d 830, 832 (8th Cir. 1998). The evidence was inadequate to substantiate all counts of conviction in this case for mail fraud. The government failed to prove Quick's guilt beyond a reasonable doubt on each offense.

In evaluating the denial of a judgment of acquittal or motion for a new trial,

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[2] But see *United States v. Butler*, 238 F.3d 1001, 1003-04 (8th Cir. 2001), declining to overrule *United States v. Davis*, but applying a differently-phrased standard of review. *Butler*, 238 F.3d at 1004.

likewise, the evidence must be viewed in a light favorable to the verdict and accepting all reasonable inferences supporting the verdict. *United States v. Cruz,* 285 F. 3d 692, 698 (8th Cir. 2002). The verdict should be upheld if substantial evidence supports it. *Id*. at 697. Substantial evidence exists if a reasonably minded fact finder could have found a defendant guilty beyond a reasonable doubt. *Id.* "Reversal is appropriate only where a reasonable jury could not have found all the elements of the offense beyond a reasonable doubt." *Id.* citing *United States v. Armstrong*, 253 F.3d 335,336 (8th Cir. 2001).

B. The Evidence Failed to Prove That the Defendant Formed the Intent Necessary to Sustain the Convictions

In order to sustain a conviction for mail fraud, the government must prove beyond a reasonable doubt that (1) a defendant engaged in a scheme to defraud; (2) that it was reasonably foreseeable that the mail or private carrier would be used in furtherance of the scheme to defraud; and that the mail or private carrier was used in furtherance of the scheme. An essential element of any mail fraud prosecution is a "scheme or artifice to defraud". 18 U.S.C. § 1341. "Essential to a scheme to defraud is fraudulent intent." *United States v. D'Amato*, 39 F.3d 1249, 1257 (2nd Cir. 1994) citing *Durland v. United States*, 161 U.S. 306, 313-14 (1896). A scheme to defraud does not have to be successful or cause injury to another. "However, the government must show 'that

some actual harm or injury was contemplated by the schemer.'" *D'Amato,* 39 F.3d at 1257. "Because the defendant must intend to harm the fraud's victims, 'misrepresentations amounting only to deceit are insufficient to maintain a mail or wire fraud prosecution'" *Id.* citing *United States v. Starr,* 816 F.2d 94, 98 (2nd Cir. 1987). Thus, it is clear that the alleged deceit must be coupled with a contemplated harm to the victim.

Mr. Quick's explanation of a failed business attempt was credible and he maintained it from his first contact with law enforcement through his testimony at trial. (T-III, p-161 through 181; T-IV, p-3 through 104). Mr. Quick explained that his new company and his new business idea was intended to avoid the loss intrinsic in the customary "hedge" investment strategy most coin dealers use. Ultimately, the cross examination of Ms. Clark and Ms. Arasmith revealed that they invested in RareTrader precisely so that they could receive interest payments and also maintain the value of their investments. Although the two women wished to testify in support of the government's general theory, their testimony supported an understanding by them of precisely the business arrangement that Mr. Quick described. The government's theory that Mr. Quick formulated a scheme and an intent to defraud from the outset of his new business is simply not supported beyond a reasonable doubt by the evidence presented.

It is true that the evidence supports Quick's having made misrepresentations, particularly as his business failed, but they were representations amounting only to deceit, and were without the requisite harmful intent that is necessary to establish the scheme element of the offense. *U.S. v. Lefkowitz*, 125 F3rd 608, 614, (8th Cir, 1997); *U.S. v. Ervasti*, 201 F3rd 1029, (8th Cir. 1999); *U.S. v. Frost*, 321 F3rd 738,741, (8th Cir.2003) (intent to cause harm in wire fraud case). The multiple errors described above so infected the trial as to require reversal. *U.S. v. Achtenberg*, 459 F2d 91, 99 (8th Cir. 1972) (multiple errors required new trial, especially where Government's case was weak and rested on credibility of one witness). It cannot be said that the evidence of intent was overwhelming, or that the cumulative effect did not undermine Quick's fair trial rights.

CONCLUSION

For the foregoing reasons, Mr. Quick requests reversal and a new trial.

Dated: _____

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CERTIFICATE OF SERVICE/ COMPLIANCE

I hereby certify that true and correct copies of the foregoing Appellant's Brief were mailed to the defendant and placed in the United States Mail addressed to:

Mr. Frank Magill, Jr,
Assistant United States Attorney
300 South 4th Street, Minneapolis, MN 55415,

this 19th day of July, 2005.

I further certify that diskettes containing the full text of this brief prepared in WordPerfect 11.0, containing 4,097 words, excluding the table of contents, table of citations, statements with respect to oral argument, preliminary statement, statement of issues, addendum and certificates of counsel and service, as counted by the word-processing system were filed and served. The brief complies with the type-volume limitations set forth in F.R.A.P. 32(a)(7)(B) and (C)(Dec. 1, 1998) and Eighth Circuit Rule 28A). I also certify that the floppy disks forwarded to the Court and opposing counsel have been scanned for viruses and are virus free.

Dated:_____ _____
Dean S. Grau

ADDENDUM